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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

TWIN OAKS CHURCH,

Petitioner,

v.

THE SUPERIOR COURT OF SANTA
CLARA COUNTY,

Respondent,

BUILDING WOW, LLC,

Real Party in Interest.

No. H034657

(Santa Clara County
Super. Ct. No. 1-08-CV114588)

I. INTRODUCTION

This original proceeding arises from a failed real estate transaction. Petitioner Twin Oaks Church entered into a purchase agreement with real party in interest Building WOW, LLC (WOW) for the sale of real property. The purchase was not completed and WOW filed a complaint against Twin Oaks Church for breach of the purchase agreement, breach of the covenant of good faith and fair dealing, fraud, and breach of a lease agreement. WOW also noticed the deposition of Twin Oak Church's attorney, Judy Tsai, and issued a subpoena for her appearance at the deposition. Twin Oaks Church moved

for a protective order barring Tsai's deposition and an order quashing the deposition subpoena. The trial court denied the motion.

Twin Oaks seeks extraordinary relief from the trial court's order, arguing that WOW failed to meet the high standard for taking the deposition of opposing counsel that was established by this court in *Spectra-Physics v. Superior Court* (1988) 198 Cal.App.3d 1487, 1493 (*Spectra-Physics*.) For the reasons stated below, we agree and therefore we will issue a peremptory writ of mandate vacating the trial court's order denying petitioner Twin Oaks Church's motion for a protective order precluding the deposition of Judy Tsai and for an order quashing the deposition subpoena and directing the trial court to enter a new order granting the motion.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Facts

Our summary of the underlying facts is drawn from the complaint. WOW was the majority owner of a commercial building in San Jose known as 20 Great Oaks Boulevard. As alleged in the complaint, WOW purchased the property in 2004 in part with financing obtained from Marshall & Illsey Bank, secured by a deed of trust and promissory note that was fully due on April 8, 2007. The majority of the space on the property was used by a church known as Family Community Church.

On May 16, 2005, Twin Oaks Church entered into a purchase agreement with WOW in which the church agreed to purchase 20 Great Oaks Boulevard for \$8.5 million. Twin Oaks Church made the initial deposits (\$500,000 total) that were required by the purchase agreement, but did not procure financing for the balance of the purchase price by the due date set forth in the agreement, September 15, 2005.

After Family Community Church vacated the property in January 2006, the parties entered into an addendum to the purchase agreement that included a restructuring of the payment plan and a lease provision that allowed Twin Oaks Church to enter the property

as a tenant in February 2006. Thereafter, WOW allegedly assisted Twin Oaks Church in negotiating with Marshall & Illsey Bank for assumption of the promissory note.

When Twin Oaks Church did not assume the promissory note and allegedly failed to perform its other financing obligations under the purchase agreement, the parties executed a February 2007 second addendum to the purchase agreement. The second addendum extended the closing date to March 31, 2007, and added another seller, minority owner Bob F. Helms, who owned an 18 percent interest in the property as tenant in common with WOW.

The parties subsequently entered into a final third addendum that extended the closing date to April 30, 2007. According to WOW, Twin Oaks Church failed to complete its financing obligations by the extended closing date and then repudiated the purchase agreement, stating that it did not have to perform under the purchase agreement because minority interest owner Helms had refused to agree to the terms of the sale. The sale of the property to Twin Oaks Church did not take place and WOW defaulted on its promissory note. Marshall & Illsey Bank foreclosed on the property in September 2007.

B. Trial Court Proceedings

WOW filed a complaint against defendants Twin Oaks Church, Bob F. Helms, and Chicago Title Company (the escrow holder),¹ on June 11, 2008. The causes of action alleged against Twin Oaks Church included breach of the purchase agreement, breach of the covenant of good faith and fair dealing, fraud, and breach of a lease agreement.²

On June 18, 2009, WOW served a deposition notice and a deposition subpoena on Judy Tsai, cocounsel for defendant Twin Oaks Church. The attachment to the deposition

¹ Chicago Title Company and Bob F. Helms are not parties to this original proceeding.

² The record reflects that Twin Oaks Church filed a cross-complaint seeking recovery of monies placed in escrow. The cross-complaint was not included in the record.

subpoena stated that WOW anticipated that Tsai's deposition would be limited to the topics of communications between Tsai and Ronald Buchholz (the managing partner of WOW), Pastor Bill Buchholz (Ronald Buchholz's father and pastor of Family Community Church), Brian Matteoni (Twin Oaks Church's real estate agent), representatives of Marshall & Illsey Bank, and "any third parties such as other financial institutions regarding the purchase of 20 Great Oaks Boulevard."

Twin Oaks Church responded by filing a motion for a protective order precluding the deposition of attorney Tsai and for an order quashing the deposition subpoena. Twin Oaks Church asserted that Tsai had represented the church during the purchase negotiations with WOW and she continued to represent the church as cocounsel in the present litigation. Relying on *Spectra-Physics*, Twin Oaks Church argued that the deposition of opposing counsel was presumptively improper and WOW could not make the showing required to overcome the presumption, since WOW had admitted during the meet and confer process that there were other means of obtaining the information sought from Tsai, WOW had already propounded discovery to obtain such information, and the information sought was not crucial to the preparation of the case.

Twin Oak Church's motion was supported by the declaration of its cocounsel, Jerome M. Varanini, to which he attached email correspondence with WOW's attorney, Andrew A. August, regarding the dispute over the Tsai deposition in which August stated, "It still appears that I am not being clear. I am not saying that Judy [Tsai] has information that we cannot obtain elsewhere. Quite to the contrary: We anticipate eliciting testimony at trial about non-privileged discussions Judy had with percipient witnesses. We want to depose her about those discussions."

Additionally, Twin Oaks Church submitted the supporting declaration of Judy Tsai, in which she stated that the church had retained her to advise them "in the transactional phase of the purchase of 20 Great Oaks Boulevard." Tsai also stated that the church and its officers and representatives had negotiated directly with WOW and her

involvement “was secondary and in furtherance of [Twin Oak Church’s] instruction to draft legal documents.” Further, she had attended only one meeting where Pastor Bill Buchholz was present, and she had not met Ronald Buchholz prior to attending a deposition in this case.

WOW opposed the motion for a protective order and an order quashing the deposition subpoena, asserting that attorney Tsai had played an integral role in negotiating the failed real estate transaction. WOW also claimed that Tsai had numerous direct communications with WOW’s representatives, as well as direct communications with minority owner Helms, representatives of Marshall & Illsey Bank, and third parties. According to WOW, it intended to produce numerous witnesses who had communications with Tsai at trial and each witness would testify as to his or her version of these communications. WOW further explained that it was entitled to determine Tsai’s version of her communications with WOW’s witnesses prior to trial through her deposition.

WOW also noted that it had agreed to forego deposing Tsai in exchange for Twin Oak Church’s agreement not to call Tsai as a witness at trial, but the church had refused. WOW argued that since Tsai might testify in trial, WOW was entitled to depose Tsai as to the limited matters stated in its subpoena so as to adequately prepare for trial. Additionally, WOW claimed that Tsai’s version of her communications with others could not be obtained elsewhere. Finally, WOW asserted that Tsai’s testimony could prove critical to preparation of the case and that no attorney-client privilege would be implicated since her deposition would be limited to communications that Tsai had with WOW and third parties.

In support of its opposition, WOW submitted copies of discovery it had propounded and Twin Oak Church’s responses, which admitted Tsai’s direct communications as to certain matters concerning the failed purchase of 20 Great Oaks Boulevard with Marshall & Illsey Bank, Ronald Buchholz, Pastor Bill Buchholz, Bob F.

Helms, and unspecified third persons. WOW also submitted copies of email correspondence between its attorney, Andrew A. August, and Twin Oaks Church's attorney, Jerome Varanini, regarding WOW's efforts to either take Tsai's deposition or obtain a stipulation that Twin Oaks Church would not call Tsai as a witness at trial.

Additionally, WOW submitted the declaration of Ronald Buchholz, who stated that he had discussed with Tsai a number of issues arising from the sale of 20 Great Oaks Boulevard to Twin Oaks Church, and a similar declaration from Pastor Bill Buchholz, with copies of their email correspondence.

In its reply brief, Twin Oaks Church provided a log of Tsai's verbal communications with Ronald Buchholz, Pastor Bill Buchholz, and representatives of Marshall & Illsey Bank. Twin Oaks Church asserted that WOW had failed "to set forth any concrete facts substantiating the need for Tsai's deposition." Twin Oaks Church also asserted that Tsai's deposition was premature because Ronald Buchholz had not appeared for his deposition and it was unknown what his testimony would be regarding his communications with Twin Oaks Church.

A hearing on the motion was held on August 7, 2009. The trial court issued its order on August 10, 2009, denying the motion. The order states that the motion for an order quashing the deposition subpoena was denied because WOW had satisfied its burden to (1) establish that there was no other practical means to obtain the information sought; (2) establish that Tsai's testimony was crucial to the preparation of the case; and (3) Twin Oaks Church had failed to meet its burden of "establishing the information sought is subject to a privilege claim. [Citations.]" The trial court also noted that Twin Oaks Church "is free to object to questions at Tsai's deposition based on the attorney-client privilege and/or work product doctrine." Finally, the court denied the motion for a protective order on the ground that Twin Oaks Church had failed "to provide any authority for the relief sought and the motion is mooted by the Court's denial of [Twin Oak Church's] motion to quash."

C. Writ Proceedings

Twin Oaks Church filed a petition for a writ of mandate and/or prohibition in this court on September 2, 2009. It sought a writ of mandate vacating the trial court's order of August 10, 2009, denying its motion for a protective order and an order quashing the deposition subpoena and directing the trial court to issue the protective order barring Tsai's deposition.

On September 15, 2009, we issued a temporary stay of all trial court proceedings and requested further briefing from the parties. After receiving WOW's preliminary opposition and the reply of Twin Oaks Church, on December 8, 2009, we issued an order to show cause why a peremptory writ should not issue as requested in the petition for a writ of mandate and provided an opportunity for further briefing. We now turn to our discussion of the merits of the petition.

III. DISCUSSION

A. Standard of Review

A discovery order is reviewed under the deferential abuse of discretion standard. (*John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1186.) “ ‘ “Where there is a basis for the trial court's ruling and it is supported by the evidence, a reviewing court will not substitute its opinion for that of the trial court. [Citation.] The trial court's determination will be set aside only when it has been demonstrated that there was ‘no legal justification’ for the order granting or denying the discovery in question. [Citations.]” [Citation.]’ ” (*Doe 2 v. Superior Court* (2005) 132 Cal.App.4th 1504, 1515.)

Thus, writ review of discovery orders is rarely granted unless the discovery order may undermine a privilege, or it is necessary to answer questions of first impression. (*Oceanside Union School Dist. v. Superior Court* (1962) 58 Cal.2d 180, 185-186; *People v. Superior Court (Mouchaourab)* (2000) 78 Cal.App.4th 403, 413.) This court has determined, however, that a discovery order allowing the deposition of opposing counsel “is a suitable subject for prerogative writ review [citation], because the damage done by

improperly allowing such discovery cannot readily be cured after it has occurred.” (*Spectra-Physics, supra*, 198 Cal.App.3d at p. 1493; *Carehouse Convalescent Hospital v. Superior Court* (2006) 143 Cal.App.4th 1558, 1566-1567 (*Carehouse*) [writ relief granted from order allowing deposition of opposing counsel].)

To determine whether the trial court abused its discretion in this case, we will review the standard that must be met before the deposition of opposing counsel may be taken.

B. Deposition of Opposing Counsel

“ ‘In the highly charged atmosphere of litigation, attorney depositions may serve as a potent tool to harass an opponent.’ [Citation.]” (*Carehouse, supra*, 143 Cal.App.4th at p. 1563.) Accordingly, “[d]epositions of opposing counsel are presumptively improper, severely restricted, and require ‘extremely’ good cause--a high standard.” (*Id.* at p. 1562; *Riverside Sheriff’s Assn. v. County of Riverside* (2007) 152 Cal.App.4th 414, 424.)

In *Spectra-Physics*, this court agreed with the federal majority view that the deposition of opposing counsel is disfavored for public policy reasons and permitted only in very limited circumstances. (*Spectra-Physics, supra*, 198 Cal.App.3d at p. 1494.) Depositions of opposing counsel disrupt the adversarial system, have limited usefulness due to the attorney-client and work product privileges, add to the time and cost of litigation, detract from the quality of client representation because of the chilling effect on client communications, and also detract from counsel’s ability to prepare the case. (*Ibid.*; *Shelton v. American Motors Corp.* (8th Cir.1986) 805 F.2d 1323, 1327 (*Shelton*).)

This court in *Spectra-Physics* adopted the three-part test developed by the federal appeals court in *Shelton, supra*, 805 F.2d at page 1327, for determining the propriety of a deposition of opposing counsel. “The circumstances under which opposing counsel may be deposed are limited to those where (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and not

privileged; (3) the information is crucial to the preparation of the case.” (*Spectra-Physics, supra*, 198 Cal.App.3d at pp. 1494, 1496.)

The proponent of the deposition of opposing counsel has the burden of proof as to the two prongs of the *Spectra-Physics* test concerning the need for the deposition--that no other means exist to obtain the information and the information is crucial to the preparation of the case--while the party opposing the deposition has the burden of establishing the applicability of the attorney-client privilege. (*Carehouse, supra*, 143 Cal.App.4th at p. 1563.) “Each of these prongs poses an independent hurdle to deposing an adversary’s counsel; any one of them may be sufficient to defeat the attempted attorney deposition.” (*Ibid.*)

In *Spectra-Physics*, the issue was whether “in preparing for a hearing to determine the good faith of a sliding scale settlement under Code of Civil Procedure section 877.6, the settling parties may depose counsel for the nonsettling defendants to inquire whether the nonsettling defendants may have been guilty of bad faith or unreasonable conduct” (*Spectra-Physics, supra*, 198 Cal.App.3d at p. 1490.) Applying the three-part test, this court ruled that the trial court had erred in permitting the depositions of opposing counsel because the proponent of the depositions had failed to meet its burden as to two prongs. (*Id.* at p. 1497.) The depositions of opposing counsel were not (1) necessary to gain information about the negotiations that had preceded the alleged bad faith settlement; or (2) crucial to the presentation of the deposition proponent’s case. (*Ibid.*)

As discussed below, we determine that WOW has similarly failed to satisfy two prongs of the three-part test established in *Spectra-Physics*.

C. Analysis

In its petition, Twin Oaks Church argues that WOW failed to meet its burden as to the first prong of the *Spectra-Physics* test because WOW has admitted that it can obtain the information sought from the deposition of attorney Tsai from other sources. Twin

Oaks Church further argues that WOW cannot satisfy the third prong of the *Spectra-Physics* test because it has not shown that the deposition of Tsai is crucial to its preparation of the case in light of WOW's admission that Tsai is not the only one in possession of the allegedly crucial information. Finally, Twin Oaks asserts that the deposition of Tsai is likely to implicate the attorney-client privilege and the work-product doctrine.

WOW counters Twin Oaks Church's arguments by claiming that it is entitled to determine Tsai's version of her communications with numerous witnesses, as follows: "WOW will produce numerous witnesses who had communications with Tsai at trial. Each of these witnesses will testify as to their version of these communications. Tsai may testify differently and that is why WOW is entitled to determine her version prior to trial through deposition."

WOW also contends that it satisfied the *Spectra-Physics* test since (1) Tsai's view of events cannot be obtained elsewhere; (2) Tsai's testimony is crucial to the preparation of the case because "understanding Tsai's version of events" is critical to the parties' claims and defenses; and (3) "the deposition subpoena is narrowly tailored to avoid implicating any attorney-client privileged discussions between Tsai and [Twin Oaks Church]."

The essence of WOW's argument is that Tsai is a percipient witness to the communications and events that preceded the failed real estate transaction that is the subject of the litigation, who may, like any other percipient witness, be deposed before trial in order to determine what her trial testimony will be. However, Tsai is not like any other percipient witness. The propriety of taking her deposition is governed by the high standard that applies to the depositions of opposing counsel, as established by this court in *Spectra-Physics*. (*Spectra-Physics*, *supra*, 198 Cal.App.3d at pp. 1494, 1496.) We agree with Twin Oaks Church that WOW has failed to meet its burden under that standard to show that the deposition of Tsai is necessary.

The first prong of the *Spectra-Physics* test requires the proponent of the deposition of opposing counsel to show no other means exist to obtain the information sought other than to depose opposing counsel. (*Spectra-Physics*, *supra*, 198 Cal.App.3d at pp. 1494, 1496.) Here, WOW admitted in email correspondence that it can obtain the information sought from other sources, when WOW's attorney informed Twin Oaks Church's attorney that "I am not saying that Judy [Tsai] has information that we cannot obtain elsewhere. Quite to the contrary: We anticipate eliciting testimony at trial about non-privileged discussions Judy had with percipient witnesses. We want to depose her about those discussions."

Moreover, WOW's showing is insufficient to establish that the deposition of Tsai is the only means of obtaining her version of her communications with WOW's witnesses. WOW has not shown that it propounded any discovery into Twin Oaks Church's contentions and the facts and evidence supporting those contentions, let alone any interrogatories or other discovery that would reveal whether Twin Oaks Church will present at trial a different version of any relevant communications between any of the witnesses. Without a showing that WOW has conducted a substantial amount of targeted discovery leading to the conclusion that Tsai's deposition is the only means of obtaining the information sought, WOW has failed to meet its burden on the first prong of the *Spectra-Physics* test. (See *Estate of Ruchti* (1993) 12 Cal.App.4th 1593, 1601 [*Spectra-Physics* test not met when other discovery techniques available to obtain the facts sought from deposition of opposing counsel].)

The third prong of the *Spectra-Physics* test requires a showing that the information is crucial to the preparation of the case. (*Spectra-Physics*, *supra*, 198 Cal.App.3d at pp. 1494, 1496.) WOW has also failed to meet this requirement. On the limited showing made below, we find that WOW's assumptions--that Tsai will testify to a different version of her communications with WOW's witnesses and knowledge of Tsai's version is crucial to its preparation of the case--are based on no more than speculation. Such

speculation may be made in any case in which opposing counsel is a percipient witness to the events preceding a failed real estate transaction, who could conceivably testify contrary to the other party's witnesses. Speculation is obviously insufficient to satisfy the deposition proponent's burden under *Spectra-Physics* and overcome the presumption that the deposition of opposing counsel is improper. (*Carehouse, supra*, 143 Cal.App.4th at p. 1562.)

We therefore determine, based on the record before us, that WOW failed to meet its burden under *Spectra-Physics* to show that (1) the deposition of Tsai is the only means of obtaining the information sought; and (2) the information sought is crucial to the preparation of the case. (*Spectra-Physics, supra*, 198 Cal.App.3d at pp. 1494, 1496.) Consequently, we conclude that there is no legal justification for the trial court's order denying Twin Oaks Church's motion for a protective order precluding Tsai's deposition and an order quashing the deposition subpoena. (*Doe 2 v. Superior Court, supra*, 132 Cal.App.4th at p. 1515.)

IV. DISPOSITION

Let a peremptory writ of mandate issue directing respondent court to vacate its August 10, 2009 order denying petitioner Twin Oaks Church's motion for a protective order precluding the deposition of Judy Tsai and for an order quashing the deposition subpoena, and to enter a new order granting the motion. Upon finality of this decision, the previously issued temporary stay order is vacated. Costs in this original proceeding are awarded to the petitioner.

BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

MIHARA, J.

MCADAMS, J.